Court of Appeals of Kentucky.

KENTUCKY RIVER NAVIGATION CO. *v.* THE COMMONWEALTH OF KENTUCKY.

A court of equity has power to specifically enforce a covenant to build or repair, where, from the impossibility of estimating damages or the danger of irreparable loss, an action at law would be an inadequate remedy.

In such a case the insolvency of the tenant is no defence.

Forfeitures are not favored in equity, but there are cases where a rescission of the contract may be decreed, although the act or omission does not fall within any express condition of forfeiture.

Such a case arises where the lessee of important and valuable works has, in breach of his covenant, allowed them to get out of repair and in danger of irreparable loss, and his insolvency prevents either an action for damages or a decree for specific performance from being an adequate remedy. A forfeiture decreed in this instance for such reasons.

Where a statute gives a right and a remedy, the latter is exclusive of all other remedies. But where the right exists independently of the statute, the remedy given by the latter is cumulative merely

BILL to forfeit and cancel a lease. The state being the owner of certain public works for the improvement of the navigation of the Kentucky river, leased the same to the plaintiff in error for fifty years, with covenants on the part of the lessee to make certain extensions and to keep the works in repair, &c. The case had already been before this court in another form, and is reported in 12 Bush 8. The facts upon which this bill was founded sufficiently appear in the opinion.

Alvin Duvall, for the appellant.

Thomas E. Moss, Attorney-General, for the appellee.

The opinion of the court was delivered by

LINDSAY, C. J., [After some remarks on the difference between the present case and that reported in 12 Bush]—It is averred by the Commonwealth that the company had permitted the improvements leased to and placed in its possession by the state to become and remain out of repair to such an extent that one or more of the locks and dams were in great and imminent danger of being washed out and destroyed, and that it was making no attempt to repair and preserve the improvements received under the lease, and was hopelessly insolvent and altogether unable to repair and preserve them.

The company, by its answer, "admits that several of the dams

are in danger of destruction, but denies that the danger has resulted from the fault of defendant, and says that the defendant has done its best to avoid said danger and to keep said dams in repair."

It then says it "does not know, nor has it sufficient information to form a belief, whether it is insolvent or not; whether it is able to put the dams leased it in repair or not; whether it is able to extend slack-water improvements to the Three Forks or not. It has subscriptions of stock made by the city of Louisville, and the counties of Woodford, Jessamine, Clark, Madison, Estill and Owsley, for $500,000, which it is advised and believes are valid, provided that a city or county can, by a vote of its people, under authority of an act of the legislature, make such subscriptions. * * * This defendant believes they are valid, but has not sufficient information to form a belief whether they will be judicially determined to be valid or not."

This is not a sufficient denial of the direct charge of insolvency. The appellant does not pretend that it is not fully informed of all the facts connected with these alleged subscriptions for stock, and it cannot escape the effect of this knowledge by declining to form an opinion as to whether, as matters of law, cities and counties can make such subscriptions, or as to whether they will be judicially determined to be valid. The provision of the Civil Code of Practice tolerating such pleading does not and cannot be made to apply to questions of law. The Commonwealth's demurrer to this portion of the answer of appellant should have been sustained.

Appellant received possession from the state of all the slack-water improvements on the Kentucky river. The act under the authority of which the lease was made provides that "the lessees shall keep the said locks and dams in good repair at their own expense:" Sect. 2, chap. 1580, vol. 1, Sess. Acts 1869.

It is admitted in this case that these locks and dams are out of repair, and that several of the dams are in danger of destruction, and it is not denied that the company is insolvent and unable to comply with the material provision, just quoted, of the act, in virtue of which the possession is held. Hence the question to be decided here is, whether this state of facts authorized the court below to declare that the lease had determined, and that the officers and agents of the Commonwealth were entitled to resume the possession and control of the leased property?

Whilst it may be conceded that the controlling purpose of the

legislature in directing the Kentucky river improvements to be leased, was to secure the completion of slack-water navigation to the Three Forks, yet it is manifest the repair and preservation of the existing improvements constituted also a material, and to the general public, a more important consideration than the extension itself. And we may assume it was in this view, the act provided that the lessees should keep the existing locks and dams in good repair at their own expense.

If the company was solvent, and able to perform its covenant to repair, and the character of the necessary repairs could be ascertained with a reasonable degree of certainty, a court of equity would decree specific execution of the contract. In general, a covenant to repair or build will not be specifically enforced against the lessee at the suit of the lessor, but to this general rule there are recognised and indispensable exceptions.

We have here a case in which an action at law for the breach of the covenant to repair would be an inadequate remedy to the lessor, considered as the mere owner or proprietor of the leased property, in view of the uncertainty of any estimate of damages that could possibly be made, and no remedy at all for the injury to the public resulting from the loss of the navigation of the river. In such a case the chancellor may well interfere to prevent irreparable mischief. And his right to interfere by injunction or other appropriate equitable remedy is recognised by Mr. Justice STORY in his works on Equity Jurisprudence (vol. 1, sects. 720 and 721) and by Taylor on Landlord and Tenant (section 685).

Covenants to build were specifically enforced in the cases of *Storer* v. *The Great Western Railroad Co.*, 2 Y. & Coll. 48, and *Stuyvesant* v. *The Mayor*, 11 Paige 414. It is true these cases did not arise out of controversies between lessors and lessees, but the principles on which they rest are clearly applicable to contracts of leasing.

If the Commonwealth had asked the alternative relief, either to have the covenant to repair specifically enforced or the contract rescinded, it would not have been a sufficient answer for the company to have set up its insolvency and utter inability to perform its contract. Its pecuniary misfortunes cannot be allowed to defeat the extension of slack-water improvements, and also to entail irreparable injury upon the Commonwealth. And as the appellee can neither have specific performance nor compensation for the breach

of the contract, it must have rescission or be left without any remedy at all.

Forfeitures of leases are not favored, and are not to be applied except in very extraordinary cases. Generally the lessor must be content with compensation, even when the contract makes express provision for re-entry on default of the tenant. But there are extreme cases in which equity may decree rescission, although the act or omission does not fall within any express condition of forfeiture: *Claffin* v. *Scott*, 7 Rob. (La.) 205.

The case under consideration is an extreme one. The lessee, it is true, is not chargeable with wilful or intentional breach of contract, but its failure to repair, and its admitted insolvency, not only defeat all the contemplated objects of the lease, but are also about to result in the most ruinous consequences to the lessor and the general public.

The character of the leased property, its uses to the public, the purposes of the lease, and the consequences of the admitted default, take this case without the general rule, and fully authorized the chancellor to adjudge that the rights of the lessee had determined, and that it was no longer entitled to retain the possession of the leased property.

It is urged in opposition to this view, that the twelfth section of the Act of February 24th 1869, provides a mode by which the state may terminate the contract, and resume possession upon one year's notice to the lessee, and after ascertaining and paying the full and fair value of the improvements made under the terms of the lease, and that this statutory remedy being specific and adequate, must be taken to exclude all others. It is a correct rule of practice that whenever a statute creates a right, and at the same time prescribes a remedy, that remedy can alone be made available; but the right of the Commonwealth to have this contract rescinded or annulled for equitable reasons, does not grow out of or depend upon the statute. It is an incident to all such contracts as that entered into in this case, and the right would be perfect and complete if the twelfth section of the act had been omitted altogether.

The purpose of the twelfth section was not to enable the Commonwealth to obtain relief against a defaulting lessee, but to authorize it to terminate the contract, and resume possession of the property in the mode prescribed, without establishing any ground of com-

plaint, or assigning any reason, except that it chose, in the exercise of its discretion, to take advantage of this reserved right.

That it might have pursued this course, instead of instituting this action, we do not doubt; but having a right to relief in equity for the reasons heretofore considered, it was not bound to submit to the delay incident to the remedy provided by the twelfth section, and in the meantime take the risk of the destruction of the property imperilled by the failure and inability of the lessee to perform its covenant to repair.

It is also complained that the court below erred in adjudging the possession of the leased property to the Commonwealth, without passing upon the claim of the appellant for compensation for the amount of money expended in improving the leased property in excess of the tolls received. It is sufficient to say this claim was not made the subject of a cross-action. It has not been litigated, and if under all the circumstances it presents a ground for relief, either at law or in equity, a matter about which we forbear to express an opinion, the judgment here appealed from will interpose no obstacle to its assertion in the future.

Being satisfied that said judgment does not in any way prejudice the substantial rights of the appellant, and that it is fully warranted by the principles of equity practice, it must be affirmed.

Supreme Court of Kansas.

ATCHISON AND NEBRASKA RAILROAD CO. v. WAGNER.

A bill of exceptions can be settled and allowed only by the judge, and when it receives his signature it should be complete and nothing left to be settled by the agreement, recollection or judgment of counsel, clerk or other person.

It is a record, and, like any other record, is not to be established by parol testimony, but must carry on its face the evidence of its own integrity and completeness.

While what is familiarly known as a skeleton bill, that is, a bill which provides for the subsequent copying by the clerk into it, and as a part of it, some paper or document is allowed, yet to make such a bill valid and complete these rules must be regarded:—

(1) The bill, in referring to such paper or document, must purport to incorporate it into and make it part of the bill. A mere reference to it, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient.

(2) The document must itself, at the time of the signature of the bill, be in existence, written out and complete.

(3) It must be annexed to the bill, and referred to as annexed, or it must be so